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IN THE

Supreme Court of the United States

October Term, 1935.

No. 39

DE FOREST HULBURD,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ Of Certiorari To The United States Circuit Court Of Appeals For The Seventh Circuit.

BRIEF FOR PETITIONER.

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On Writ Of Certiorari To The United States Circuit Court Of Appeals For The Seventh Circuit.

BRIEF FOR PETITIONER.

May It Please The Court:

On June 3, 1935 *(295 U. S. ——)* this Court granted the writ of *certiorari* to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit (R. 90-100), published in *76 F. (2d) 736*, reversing a decision of the Board of Tax Appeals in favor of the petitioner, which decision is reported in *27 B. T. A. 1123.** (R. 76 to 80.)

* The Board by order severed the issues and tried the question of the statutes of limitations before deciding the question on the merits, but decided the limitation question against petitioner. 21 B. T. A. 23. (R. 68)

STATEMENT OF THE CASE.

The petitioner was on February 26, 1925 discharged as executor of the estate of Charles H. Hulburd, who died January 14, 1924. The other executor was Hugh McBirney Johnston, but he died pending the proceedings before the Board of Tax Appeals and no one was substituted in his place.

Petitioner's intestate, Charles H. Hulburd, more than four years before his death and in the year 1919 had received $8,000 as a liquidating dividend from the Van Sicklen Company and in this proceeding the respondent sought to pursue this $8,000 and take it for an alleged tax due from the Van Sicklen Company. This alleged tax arose out of the following facts: In the year 1919 the Van Sicklen Company, an Illinois corporation, sold all of its assets and business to the Van Sicklen Speedometer Company, a corporation of Delaware, and received as consideration therefor $250,000 in cash and 5,000 shares of the common stock of the vendee without par value, being $100.00 per share in cash and two shares of the common stock of the Delaware corporation for each outstanding share of the Illinois corporation. The Illinois corporation distributed the stock of the Delaware corporation and the $250,000 in cash to its stockholders (R. 84) and dissolved in September, 1919 (R. 39). An income and profits tax return was filed for the Illinois corporation for the fiscal year ended September 30, 1919, with the Collector of Internal Revenue at Chicago, Illinois, on December 31, 1919 and the tax shown due therein was paid (R. 37).

The Illinois corporation, the Van Sicklen Company, had commenced business with an authorized capital stock of $150,000 of which $90,000 was paid in, in property and the remainder in cash. On May 6, 1915, the authorized capital stock was increased to $250,000, the additional $100,000 being subscribed and paid for in cash (R. 31). Thus the investment in the Illinois corporation by its stockholders was $250,000, which investment and no more was returned to them in cash and in addition they received 5,000 shares of the common no par value stock of the Van Sicklen Speedometer Company. By reason of the failure of the Van Sicklen Company to return an income these 5,000 shares of no par value stock and pay tax thereon at the fair market value thereof claimed by the Commissioner, an additional tax in the amount of $227,872.06 plus a fraud penalty of $113,936.03 was assessed against it by the Commissioner of Internal Revenue on November 17, 1924 (R. 37), more than five years after its dissolution.* In any event taxable income on account of receipt of this stock could only have accrued to the Van Sicklen Company if the stock had a fair market value. The petitioners in their petition alleged that it had no fair market value (R. 14) and at the hearing the respondent abandoned the claim that it did (R. 39).

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* On the question of whether any income arose on account of receipt of this no par value stock, see the 5 to 4 decision of this Court in **Marr v. United States, 268 U. S. 536**, and **Weiss v. Stearn, 265 U. S. 242.** Subsequent Revenue Acts expressly exempted such stock received in a reorganization from tax until sold. U. S. C. Title 26, Sec. 934 (2) (4), Sec. 112 (d) (1), Revenue Acts of 1928, 1932, 1934, Sec. 203 (e) (1) Revenue Acts of 1924 and 1926. Furthermore, the fraud penalty was not determined or assessed until after the corporation dissolved. A penalty is a personal punishment and dies with the person. That a penalty is not collectible from transferees where it is assessed after a corporation is dissolved, is held in G. C. M. 1126 C. B.VI-1, p. 117. See also L. O. 1091, C. B. I-1, p. 422, and authorities there cited.

However, inasmuch as the Van Sicklen Company had dissolved more than five years prior to this assessment there was no entity in existence to contest the tax and as a result the assessment was unheeded and unpaid.

By letter of April 16, 1924 (a few months before this assessment was made), the executors had advised the Commissioner of Hulburd's death and that they were acting as executors and requested him to make a determination of taxes due from Hulburd within one year, and by letter of April 20, 1925 (written five months after the making of the assessment against the defunct Van Sicklen Company), the Commissioner wrote the executors advising them that the case was closed, without making any mention of the claim involved in this case. These letters are set forth in the margin (R. 93).

The deficiencies mentioned in the letter of April 20, 1925, totalling $5,596.18, were assessed and were paid by the petitioner here and he deemed the case closed inasmuch as this letter of the Department so stated.

On February 26, 1925, the petitioner was discharged by the Probate Court as executor, and the estate declared

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"April 16, 1924.

Commissioner of Internal Revenue,
Washington, D. C.
Dear Sir:

Pursuant to your letter of April 14, 1924, to our attorneys, Messrs. Gardner and Carton, 76 West Monroe Street, Chicago, the undersigned DeForest Hulburd and Hugh McBirney Johnston as Executors of the Will of Charles H. Hulburd, deceased, hereby request that all taxes due on account of income received during the lifetime of said Charles H. Hulburd, deceased who died January 14, 1924, be determined and assessed within one year, in accordance with the provisions of Section 250 (d) of the Revenue Act of 1921. A certified copy of our letters testamentary is enclosed herewith.

Yours respectfully,
(signed) DeForest Hulburd,
(signed) Hugh McBirney Johnston."

Encl.

settled and the Final Account of the executors showing how they had distributed the estate, approved (R. 65). One year after petitioner's discharge and after the distribution of the estate by them had been approved by the Probate Court, and on February 26, 1926, the Revenue Act of 1926, under which the proceeding in the case at bar was brought, was enacted. Eight months after its enactment the Commissioner first made this claim against the "Estate of Charles H. Hulburd" (R. 15).

The claim in he case at bar was made one year and eight months after petitioner's discharge as executor and

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"Treasury Department
Washington

April 20, 1925.

IT:PA:1
FMA-106
Mr. DeForest Hulburd and Hugh McBirney Johnston,
Executors, Estate of Charles H. Hulburd,
c/o Gardner and Carton,
76 West Monroe Street,
Chicago.

Sirs:

Reference is made to your letter dated April 16, 1924, in which you requested that this office determine and assess all taxes due on the income received by the above-named decedent during his lifetime in accordance with the provisions of Section 250 (d) of the Revenue Act of 1921.

In reply you are advised that an examination of the returns filed by Charles H. Hulburd for the years 1919 to 1921 inclusive discloses no further adjustments necessary for these years.

The audit of the returns for 1922 and 1923, as made by the Supervising Internal Revenue Agent discloses deficiencies of $804.00 and $472.50 respectively.

The return filed for th period January 1, 1924, to January 14, 1924, the date of the taxpayer's death, has been audited in this office. The correct tax liability is found to be $4,319.68, none of which has been assessed.

You are advised that the deficiencies totaling $5,596.18 will be listed at once for assessment and you will be further advised in a separate communication from this office.

Since the Revenue Act of 1924 is now in effect, the case has been closed under Section 277 (a) (3) of that Act.

Respectfully,
J. G. BRIGHT,
Deputy Commissioner,
By (signed) A. Lewis,
Head of Division."

after he had distributed the estate, in a notice of deficiency (R. 15) addressed as follows:

"Estate of Charles H. Hulburd,
c/o De Forest Hulburd,
86 East Randolph Street,
Chicago, Illinois,"

and claiming a liability as follows:

> "As provided by *Section 280 of the Revenue Act of 1926*, there is proposed for assessment against the estate the sum of $24,000.00, constituting its liability as a transferee of the assets of the Van Sicklen Company" (R. 15).

From this notice the petitioner appealed to the Board of Tax Appeals assigning as error that the Commissioner erred in proposing to assess the estate of Charles H. Hulburd as a transferee of the property of the Van Sicklen Company (R. 6 [e]) and alleging that the estate had been wholly distributed and settled and the petitioners duly discharged as executors (R. 7 [f]). The petition annexed as Exhibit "C" thereto, a copy of the order of the Probate Court discharging them as executors (R. 7, par. 5, and R. 26), which order was dated February 26, 1925 (R. 27). In the petition it was also alleged that no property of the Van Sicklen Company was possessed by Charles H. Hulburd at the time of his death or was transferred to or received by the petitioners as his executors or was at any time a part of or included in the estate of Charles H. Hulburd (R. 9). The petition also pleaded the statute of limitations and assailed the determination of tax against the Van Sicklen Company,

The Board of Tax Appeals in *27 B. T. A. 1123*, gave judgment on the merits for this petitioner, saying that

the claim in the above quoted notice of deficiency was against the estate as a transferee and (R. 78):

> "The evidence clearly establishes that the estate itself was not a transferee of the assets of the Van Sicklen Company. The corporation distributed its assets and was dissolved prior to decedent's death and it does not appear that any part of such assets as were transferred by the corporation to him during his life were owned or possessed by him at the time of his death or in any way came into the hands of the executors of his estate."

The Board of Tax Appeals also said that at the time of the enactment of the Revenue Act of 1926 and at the time respondent first made this claim, the estate of Charles H. Hulburd was not in existence and the petitioners were not executors and consequently there was at the time of the enactment of this Act no existing liability of non-existing entities, viz.: the estate or petitioners as executors. The Board said (R. 79):

> "We are of opinion that at the time the notice was mailed there was no liability of the estate or of the petitioners as executors. Both were at that time out of existence and it would be an anomaly to recognize an existing transferee liability of a non-existing transferee. *Section 280 of the Revenue Act of 1926* did not create new liabilities but only provided a new remedy for enforcing existing liabilities. *Phillips v. Commissioner, 283 U. S. 580.* No authority is cited for giving it a retroactive application as a remedy to enforce defunct liabilities or as reviving them."

From this decision of the Board the Commissioner appealed to the Circuit Court of Appeals for the Seventh Circuit and that Court held that De Forest Hulburd was liable as a legatee, notwithstanding he had received none

of the assets of the Van Sicklen Company, either as executor or legatee, and further held him liable as executor because he had not notified the Commissioner of Internal Revenue of his discharge. *(76 F. (2d) 736.)*

As the Circuit Court of Appeals stated in its opinion (R. 94), the question of the liability of the petitioner as a legatee had not been raised by the Commissioner before the Board of Tax Appeals.* Neither was it raised in the above quoted notice of deficiency (R. 15) which was addressed solely to the estate and which solely asserted a liability as a transferee against the estate alone, as fully appears from the quotation from it on page 6 hereof, nor was it made in the assignment of errors in the petition for review of the Board's decision (R. 86). It was raised for the first time in the Commissioner's brief filed in the Circuit Court of Appeals on January 27, 1934.

ERRORS TO BE URGED.

The petitioner urges that the Circuit Court of Appeals erred:

(1) In holding petitioner liable and reversing the Board's decision on a ground neither asserted by the Commissioner in the notice of deficiency nor before the Board of Tax Appeals, nor in the assignment of errors in his petition for review of the Board's decision;

(2) In holding that *Section 281 (a)* and *(b) of the Revenue Act of 1926* was retroactive and imposed liabilities upon persons who had been discharged as executors long prior to its enactment;

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* The question of personal liability of the executor under Section 3467 R. S. was expressly abandoned before the Board by respondent (R. 80).

(3) In holding that *Section 280 of the Revenue Act of 1926* created a liability and that thereunder petitioner was liable;

(4) In holding that the statute of limitations was tolled by the deficiency notice sent to the executors on October 27, 1926, or a year and eight months after their discharge;

(5) In failing to hold that the sections of the Act as construed by it violated the *Fifth Amendment to the Federal Constitution;*

(6) In reversing the decision of the Board of Tax Appeals.

STATUTES INVOLVED.

Revenue Act of 1926, C. 27, 44 Stat. 9.

Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in *subdivision (d) or (f)* of this *section* or in *sections 279, 282, or 1001,* no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in Court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Nothwithstanding the provisions of *section 3224 of the Revised Statutes* the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is

in force may be enjoined by a proceeding in the proper Court. *(U. S. C. App., Title 26, Sec. 1048.)*

Sec. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in Court for collection, and the provisions prohibiting claims and suits for refunds):

(1) The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war profits tax Act.

(2) The liability of a fiduciary under *section 3467 of the Revised Statutes* in respect of the payment of any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax.

(b) The period of limitation for assessment of any such liability of a transferee or fiduciary shall be as follows:

(1) Within one year after the expiration of the period of limitation for assessment against the taxpayer; or

(2) If the period of limitation for assessment against the taxpayer expired before the enactment of this Act but assessment against the taxpayer was made within such period—then within six years after the making of such assessment against the taxpayer, but in no case later than one year after the enactment of this Act.

(3) If a Court proceeding against the taxpayer for the collection of the tax has been begun within either of the above periods, then within one year after return of execution in such proceeding.

(c) For the purposes of this section, if the taxpayer is deceased, or in the case of a corporation, has terminated its existence, the period of limitation for assessment against the taxpayer shall be the period that would be in effect had the death or termination of existence not occurred.

(d) The running of the period of limitation upon the assessment of the liability of a transferee or fiduciary shall, after the mailing of the notice under *subdivision (a) of section 274* to the transferee of fiduciary, be suspended for the period during which the Commissioner is prohibited from making the assessment in respect of the liability of the transferee or fiduciary, and for 60 days thereafter.

(e) This section shall not apply to any suit or other proceeding for the enforcement of the liability of a transferee or fiduciary pending at the time of the enactment of this Act.

(f) As used in this section, the term "transferee" includes heir, legatee, devisee, and distributee. *(U. S. C. App., Title 26, Sec. 1069.)*

Sec. 281. (a) Upon notice to the Commissioner that any person is acting in a fiduciary capacity such fiduciary shall assume the powers, rights, duties, and privileges of the taxpayer in respect of a tax imposed by this title or by prior income, excess-profits, or war-profits tax Act (except as otherwise specifically provided and except that the tax shall be collected from the estate of the taxpayer), until notice is given that the fiduciary capacity has terminated.

(b) Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in *section 280*, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated.

(c) Notice under *subdivision (a)* or *(b)* shall be given in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

(d) In the absence of any notice to the Commissioner under *subdivision (a)* or *(b)*, notice under this title of a deficiency or other liability, if mailed to the taxpayer or other person subject to liability at his last known address, shall be sufficient for the purposes of this title even if such taxpayer or other person is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. *(U. S. C., App., Title 26, Sec. 1070.)*

Revenue Act of 1928, Section 602 (adding *section 912 to Revenue Act of 1924*), *45 Stat. 872, 873 (26 U. S. C. A. Sec. 1229)*.

Burden of Proof.

"In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer, but not to show that the taxpayer was liable for the tax."

Revised Statutes, Sec. 3467.

"Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid. *(U. S. C., Title 31, Sec. 192.)*"

SUMMARY OF ARGUMENT.

When the *Revenue Act of 1926* was enacted the executors had been discharged and the estate as such was out of existence. Consequently it had no existing liability and

the *1926 Act* merely provided a procedure for the enforcement of a then existing liability at law or in equity. Recognizing an existing liability against an estate not in existence is like recognizing an existing liability against a dead man—an anomaly unknown to the law. The former executors were not personally liable under *section 3467 of the Revised Statutes* because this section has been uniformly construed by the Courts to require notice to executors of a claim of the United States before personal liability may be invoked thereunder.

Even if the estate had been in existence and if the executors had been such at the time of the enactment of the *Revenue Act of 1926* and at the time of the mailing of the notice of deficiency, the estate would not have been liable for the reason that no property of the Van Sicklen Company was at any time received by it and a liability under the trust fund doctrine depends solely upon following and identifying trust property and does not exist apart from the trust property. It is a liability attaching to the *res* or strictly in *rem* and not in *personam*.

The claim against the legatee was not made in the notice of deficiency nor before the Board of Tax Appeals nor in the assignment of errors in the petition for appeal and should not have been considered by the Circuit Court of Appeals. Moreover, when first made in the Commissioner's brief in the Circuit Court of Appeals in January 1934 the right to make it was barred by limitation. Even if this claim had been properly before the Court there was no liability on the part of petitioner as legatee because he did not receive any of the trust property.

In any event the notice of deficiency was insufficient to extend the statute of limitations as to a claim against the estate.

ARGUMENT.

THE NATURE OF THE LIABILITY UNDER SECTION 280.

Section 280 of the Revenue Act of 1926 did not create or define any liability. It merely provided "a new remedy for enforcing the existing liability at law or in equity." *(Phillips v. Commissioner, 283 U. S. 589, 594.)*

The Circuit Court of Appeals in its opinion in the case at bar said:

> "The petitioner failed to show identity of funds or other facts which would permit him to follow the $8,000 into the hands of the executor as a fund impressed with a trust. He does not and cannot, therefore, base his right to assess the tax on any trust fund theory *other than that created and defined by the statute.*" (Italics ours.) (R. 96.)

The entire opinion of the Circuit Court of Appeals proceeds upon the theory squarely stated in the above quotation therefrom that *Section 280* creates and defines a liability and imposes a tax. The Court said:

> "Upon the death of a transferee, his estate becomes liable for the tax* to which the deceased transferee was subject. The estate was not the transferee of a transferee. The estate was the original transferee. A legatee of the deceased to whom the estate was passed was also by *Section 280 (3) (f)* an original transferee." (R. 98, 99.)

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* G. C. M. 6343 published in C. B. VIII-2, p. 220, cited with approval in **Philadelphia Rapid Transit Co. v. U. S., 10 F. Supp. 591, 600,** recognizes that liability under Section 280 is not a tax liability.

The Court seemed to overlook the very meaning of the word "transferee," which necessarily means one to whom property has been transferred and while it is defined by the statute to include "heir, legatee, devisee, and distributee," manifestly it cannot and is not intended to include such persons unless property of the taxpayer has been transferred to them. *Whitney 26 B. T. A. 212, 217.* (acquiesced in C. B. XIII-2, p. 19). That *section 280* does not impose a tax on a transferee or make a transferee liable for the tax of the transferor was expressly stated by the Senate Finance Committee in its Report on *section 280*, as follows (quoted by the Board of Tax Appeals, R. 72, 73):

> "In all of the above cases the *transferee is not liable for the tax of the transferor*, but is by reason of the receipt of the assets subject to an independent liability in his own person and payable out of his own estate *arising under the trust fund doctrine* or some similar theory." (Italics ours.)

That this section does not define or create any liability or change a pre-existing liability is made plain from the statements in the Reports of the Committees having charge of the legislation. The Conference Report on the *Revenue Act of 1926, 69th Congress, First Session, Report No. 356*, states at page *43*:

> "*Without in any way changing the extent of such liability of the transferee under existing law*, the amendment enforces such liability (whether in respect of the tax as originally returned by the taxpayer or a deficiency therein) in the same manner as liability for a tax deficiency is enforced; that is, notice by the Commissioner to the transferee and opportunity either to pay and sue for refund or else to proceed before the Board of Tax Appeals, with review by the Courts." (Italics ours.)

The Senate Finance Committee Report (which is quoted in the opinion of the Board of Tax Appeals at page 73 of the Record) states as follows:

> "It is the purpose of the Committee's amendment to provide for the enforcement of such liability to the Government by the procedure provided in the Act for the enforcement of tax deficiencies. *It is not proposed, however, to define or change existing liability.* The section merely provides that *if the liability of the transferee exists under other law*, then that liability is to be enforced according to the new procedure applicable to tax deficiences."* (Italics ours.)

That *Section 280* does not create and does not define any liability has been uniformly recognized by Courts in cases other than the one at bar. *Exchange National Bank of Shreveport v. United States, 65 F. (2d) 316 (C. C. A., 5th); Commissioner v. Oswego Falls Corporation. 71 F. (2d) 673, 676 (C. C. A., 2nd)*

From this it follows that the sections of the *Revenue Act* merely provide a procedure to enforce an existing liability of a transferee if such liability exists under law apart from the *Revenue Act*

In *G. C. M. 6343.* published in *C. B. VIII-2, page 220.* the General Counsel for the Bureau of Internal Revenue states:

> "An assessment under *section 280* cannot be regarded as creating a liability on the part of the transferees greater than that which would have been created by a judgment obtained against them under the 'trust fund theory' (applied in *United States v. Boss & Peake Automobile Co., 285 Fed. 410, Treasury Deci-*

* This report is also quoted in **Wire Wheeled Corporation of America, 16 B. T. A. 737, at page 742, which was affirmed by the Circuit Court of Appeals for the Second Circuit in 46 F. (2d) 1013.**

sion 3442 (C. B. II-1. 43), and in other similar decisions), which is that where, upon dissolution of a corporation, its assets are distributed among the stockholders, the latter become liable to creditors of the corporation in an amount not to exceed the value of the property received by them. This principle applies to taxes due the Government upon the dissolution of a corporation.

"*Section 280* provides that the amount of the liability, at law or in equity, of a transferee, *in respect of the tax imposed upon the transferor*, shall be assessed. Since the individual against whom the assessments under the provisions of *section 280 of the Revenue Act of 1926* were made *were not technically taxpayers* (the transferor corporation alone being such in this case), *but were merely liable as transferees for the payment of the transferor corporation's tax, and since the statute does not change or make their liability a tax liability*, but simply provides for the assessment of the amount of a liability at law or in equity, *section 284 of the Revenue Act of 1926*, providing that where there has been an overpayment of tax the amount of such overpayment shall be credited against any tax then due from the taxpayer, is no authority for crediting overpayments by individual taxpayers against the amounts of their liability at law or in equity assessed against them under *section 280* of the Act." (Italics ours.)

Such existing liability of "a transferee of property of a taxpayer" "at law or in equity" only existed in equity under the trust fund doctrine* and at law in certain cases by virtue of the provisions of statutes of some of the states.

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* Commissioner v. Keller, 59 F. (2d) 499; United States v. Updike, 8 F. (2d) 913, 917; United States v. Garbutt, 35 F. (2d) 924, 925; Whitney, 26 B. T. A. 212, 216, and cases cited therein on page 217.

THERE IS NO AUTHORITY IN THE REVENUE ACT OF 1926 FOR PROCEEDING UNDER SECTION 280 AGAINST ESTATES DEFUNCT AT THE TIME OF ITS ENACTMENT.

Section 280 deals with the existing liability of a transferee. If a transferee is dead, certainly he may not be proceeded against. If an estate is not in existence, certainly it may not be proceeded against. If executors are in fact no longer executors, they may not be proceeded against as executors although they may be personally liable under certain circumstances.

For the convenience of the Court we requote the pertinent provisions of the *Revenue Act of 1926,* (quoted on pages 10 and 11 hereof), which conferred jurisdiction on the Board of Tax Appeals in these cases:

> "*Sec. 280 (a) (1).* The liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax (including interest, additional amounts, and additions to the tax provided by law) imposed upon the taxpayer by this title or by any prior income, excess-profits, or war-profits tax Act.
>
> *Sec. 280 (a) (2).* The liability of a fiduciary under *section 3467 of the Revised Statutes* in respect of the payment of any such tax from the estate of the taxpayer.
>
> Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax."

It is conceded that the estate was not "a transferee of property of the taxpayer" and, as hereinafter pointed out, any claim to liability under *Section 3467 of the Revised Statutes* was abandoned before the Board of Tax Appeals so that the two above quoted provisions of the statute may be put to one side.

The only other provision we can find in the *Revenue Act of 1926* upon which this proceeding may be sought to be based is the following provision of *Section 281 (b)*:

> *"Sec. 281 (b).* Upon notice to the Commissioner that any person is acting in a fiduciary capacity for a person subject to the liability specified in *section 280*, the fiduciary shall assume, on behalf of such person, the powers, rights, duties, and privileges of such person under such section (except that the liability shall be collected from the estate of such person), until notice is given that the fiduciary capacity has terminated."

It is fully pointed out on pages 21 to 22 of this brief that this section of the *Revenue Act of 1926* was not retroactive and hence did not authorize this proceeding because the executors had been discharged and the estate distributed long prior to its enactment. If we are correct in this, it is unnecessary to proceed further to demonstrate that the decision of the Circuit Court of Appeals must be reversed and the decision of the Board of Tax Appeals affirmed. The Board of Tax Appeals in its opinion said (R. 79):

> "We are of opinion that at the time the notice was mailed there was no liability of the estate or of the petitioners as executors. Both were at that time out of existence, and it would be an anomaly to recognize an existing transferee liability of a non-existing transferee. *Section 280 of the Revenue Act of 1926* did not create new liabilities, but only provided a new remedy for enforcing existing liabilities. *Phillips v. Commissioner, 283 U. S. 589.* No authority is cited for giving it a retroactive application as a remedy to enforce defunct liabilities or as reviving them."

On November 17, 1924, when the Commissioner made his assignment against the Van Sicklen Company, he knew

that the Van Sicklen Company had sold its assets to another company and had dissolved and distributed its assets for he based his assessment on that very sale. On April 16, 1924, the executors had written him notifying him that they were executors and requesting determination of taxes within one year (R. 93). Thus seven months before he made the assessment against the defunct Van Sicklen Company he had notice of Hulburd's death and that the petitioner was executor of his estate. On April 20, 1925, aproximately five months after his assessment against the defunct Van Sicklen Company, he wrote the petitioner advising him that the tax case had been closed and giving him no notice of the claim sought to be enforced here (R. 93). In these circumstances the Board of Tax Appeals appropriately observed (R. 79):

> "With full knowledge of his opportunity and ample time within which to use it, the Commissioner took no step to present a claim, but permitted the estate to be closed and the executors discharged without knowledge of the possible liability."

It is elementary that a judgment against one in his capacity as executor is a judgment payable only out of the assets of the estate in his possession in that capacity. When these assets have been duly and regularly distributed and the distribution approved by the Court and the executors discharged, such a judgment is an obvious futility and no authority can be cited for the maintenance of a proceeding against executors as executors. A case recognizing these fundamental principles is *Lindley v. United States, 59 F. (2d) 336 (C. C. A., 9th).**

* In that case the legatees were sued as well as the executors and while the Court held the executors were not liable it held that the legatees were liable because the trust fund was traced into their hands. In the case at bar the proceeding was solely against the estate and not against the legatee and here the legatee received no property of the taxpayer—the Van Sicklen Company.

THE RESPONDENT WAS NOT PERSONALLY LIABLE.

The Circuit Court of Appeals in its opinion in the case at bar thought that *Section 281 (b) of the Revenue Act of 1926 (26 U. S. C. A., Sec. 1070)* was applicable (R. 98). But petitioner had been discharged as executor one year before the enactment of this section. The Board of Tax Appeals in its opinion in the case at bar said (R. 80):

> "*Section 280, Revenue Act of 1926*, and *Section 312, Revenue Act of 1932*, were not in effect during the existence of this estate and imposed no duties upon the executors here. The decisions under those sections are therefore not pertinent."

In construing *Section 281** to be retroactive the opinion of the Circuit Court of Appeals in the case at bar is on this point squarely in conflict with the decision of the Court of Appeals for the Second Circuit in *Liberman's Committee v. Commissioner, 54 F. (2d) 527*, wherein the Court at page *529* quotes the statute and the Treasury Regulation thereunder and says:

> "Secondly, and this seems to us a conclusive answer to the contention, *section 281 (a), 26 U. S. C. A., Sec. 1070 (a)*, speaks prospectively from the date of its enactment, February 26, 1926 (see *section 286, (26 U. S. C. A., Sec. 931, note)*), and relates only to actual fiduciaries who thereafter give notice to the Commissioner that they are acting as such."

The same observation would, of course, apply to *Section 281 (b)*.

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* This section, set out on page 19 hereof, does not impose a personal liability but expressly provides "the liability shall be collected from the estate".

The opinion in the case at bar makes no attempt to distinguish this case. The Circuit Court of Appeals for the Second Circuit and the Board of Tax Appeals in the case at bar are manifestly correct and the Circuit Court of Appeals for the Seventh Circuit is manifestly wrong in giving this statute retroactive effect. Otherwise any person who had been an executor and was discharged prior to the date of the enactment of the *Revenue Act of 1926* would be made liable by that Act unless he thereafter gave notice that he was no longer acting as executor. If this is the law, thousands of executors discharged years ago are still liable. Such a construction is opposed to the familiar rule against retroactive construction many times stated by this Court. (See *Union Pacific R. R. Co. v. Laramie Stock Yards Co., 237 U. S. 190, 199.)* There are no words either in the statute quoted or in the regulation promulgated thereunder* purporting to be retroactive and to apply to estates closed prior to its passage, and hitherto no Court has so construed it. Nor had the Treasury Department so construed it.

Other than the provisions of the statute which have been discussed above, there is one other statute which is pertinent and that is *Section 3467 of the Revised Statutes* (quoted on page 12 of this brief).** The notice of deficiency makes no claim under *Section 3467 of the Revised Statutes* and such claim was not only not made but was expressly abandoned before the Board of Tax Appeals. The Board said:

> "The respondent disclaims any attempt in this proceeding to invoke such a remedy" (R. 80).

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* Article 1292, Reg. 69, quoted in Liberman's Committee, 54 F. (2d) 527, at page 529.

** This is the Federal statute designed to provide for personal liability of executors.

In its reply brief in the Circuit Court of Appeals (p. 8 thereof), the Government expressly stated that it did not rely in this case upon *Section 3467.***

Nevertheless, on the merits it is clear that petitioner is not liable under *Section 3467 of the Revised Statutes* because he had no notice of the Government's claim during the time he was executor.

That this section creates no lien is clear from the decision of the Circuit Court of Appeals for the Second Circuit in *United States v. Western Union Telegraph Co., 50 F. (2d) 102,* and cases therein cited.

This section is set out and fully annotated in *Title 31, Section 192, U. S. C. A.,* and from these annotations, under the healing "Notice of Debt," it appears that an executor is not liable unless he received notice of the claim of the Government during the time he was executor. It was so held in *United States v. Clark, Fed. Cas. No. 14,807,* decided in 1826.

In *United States v. Fisher, 2 Cranch, 358; 2 L. Ed. 304,* no less an authority than Chief Justice Marshall said:

> "I only say for myself, as the point has not been submitted to the Court, that it does not appear to me to create a *devastavit* in the administration of effects and would require notice in order to bind the executor, or administrator or assignee."

** Review is restricted to questions and issues made and considered in the Court below and there decided. It is further limited to questions and errors which have been properly saved for review as shown by the record. **Longdorf's Cyclopedia of Federal Procedure, Vol. 6, Section 2973.** Defenses not made below are ordinarily not considered—**Sec. 2974.** Proper assignments and specifications of error are essential to review of questions on appeal—**Sec. 2976.**

It is obvious that if the law were otherwise no one could safely become an executor or administrator because years after his discharge the Government might present a claim against him, notwithstanding he had given the Government notice that he was executor and requested it to present its claim and it presented a claim but omitted from that presentation another and different claim presented for the first time years after the estate had been closed and the assets distributed.

The statement of Chief Justice Marshall and the decision in *United States v. Clark, supra,* were quoted and followed in *United States v. Eggleston, Fed. Cas. No. 15,027,* decided March 5, 1877. The *Clark case* was decided in 1826 and *Section 3467* had been re-enacted many times since, and if Congress had meant the law to be different than it has been judicially construed since 1826, it certainly would have amended it. (Compare *Heald v. District of Columbia, 254 U. S. 20, 23.)* Furthermore, the contrary construction would place a concealed danger in the way of one undertaking to become an executor and render it an undertaking from which prudent men might well shrink.

In this connection what is hereinafter said about the right of the Circuit Court of Appeals to consider a point not made before the Board of Tax Appeals is also pertinent, but whether it has the right or not, the foregoing shows that there is no liability in the case at bar under *Section 3467 of the Revised Statutes,* because to give rise to liability thereunder there must be notice of the Government's claim prior to the executors' discharge under the uniform and long continued judicial construction of that section.

EVEN IF THE ESTATE HAD BEEN IN EXISTENCE AND IF THE EXECUTORS HAD BEEN SUCH AT THE TIME OF THE ENACTMENT OF THE REVENUE ACT OF 1926 AND AT THE TIME OF THE MAILING OF THE NOTICE OF DEFICIENCY IN THE CASE AT BAR, THE ESTATE WOULD NOT HAVE BEEN LIABLE BECAUSE NO PROPERTY OF THE VAN SICKLEN COMPANY WAS RECEIVED BY IT.

The burden of proof by statute was upon the Commissioner of Internal Revenue. The words of the statute are *(Revenue Act of 1928, Sec. 602)* (adding *Section 912* to *Revenue Act of 1924) 45 Stat. at L. 872, 873 (26 U. S. C. A., Sec. 1229)):*

> "In proceedings before the Board the burden of proof shall be upon the Commissioner to show that a petitioner is liable as a transferee of property of a taxpayer."

The Commissioner utterly failed to meet the burden of proof because he failed to show that petitioner was liable "as a transferee of property of a taxpayer." The Board of Tax Appeals in its opinion said (R. 78):

> "The evidence clearly establishes that the estate itself was not a transferee of the assets of the Van Sicklen Company. The corporation distributed its assets and was dissolved prior to decedent's death, and it does not appear that any part of such assets as were transferred by the corporation to him during his life were owned or possessed by him at the time of his death or in any way came into the hands of the executors of his estate."

The correctness of this statement of the Board was not and cannot be challenged but must be conceded by the respondent.

The Circuit Court of Appeals said (R. 96):

> "The petitioner failed to show identity of funds or other facts which would permit him to follow the $8,000 into the hands of the executors as a fund impressed with a trust. He does not and cannot, therefore, base his right to assess the tax on any trust fund theory other than that created and defined by the statute."

As we have pointed out, the statute does not create and define any liability, as the Circuit Court of Appeals in the above quotation erroneously assumed, and inasmuch as the Commissioner failed to sustain the burden of proof imposed upon him by the statute the decision of the Board of Tax Appeals was correct and should not have been reversed by the Circuit Court of Appeals. To be liable it was necessary for the alleged transferee to have received property of the taxpayer. *People's Industrial Life Ins. Co. v. United States, 29 F. (2d) 650, (C. C. A. 5th).*

To say that a liability under the trust fund doctrine survives apart from the property sought to be impressed with a trust, is to overlook the essential nature of a liability under the trust fund doctrine, which is a liability in *rem*, attaching to the *res* and not a liability in *personam*.

A LIABILITY UNDER THE TRUST FUND DOCTRINE DOES NOT SURVIVE TO EXECUTORS WHO HAVE RECEIVED NO PROPERTY IMPRESSED WITH A TRUST.

At Common Law where one received the assets of a dissolved corporation, there was no liability. This situation caused Mr. Justice Story in *Wood v. Dummer, 30 F. Cas.*

17944, to discover the trust fund doctrine in equity.* That is the only theory of equitable liability. There being no liability at common law in such situation, if any liability exists at law as distinguished from equity it is purely statutory, and neither before the Board nor in the Court of Appeals, nor in his answer to the petition here, did the Commissioner cite or rely upon any statute claimed to create liability other than *section 280, supra.* Consequently there is no liability at law and if any liability exists in equity it arises out of the trust fund doctrine.

A liability under the trust fund doctrine is inseparable from the fund impressed with the trust and if that fund does not pass to the executor or the legatee the liability does not pass. *Kessig v. Lea, 168 Minn. 14; 196 N. W. 655.* Where a decedent has received property impressed with a trust, his executors are only liable for such part of it as has actually come into their possession and not for the full amount received by decedent. *In re Read's Est., 253 N. Y. S. 648; 141 Misc. 716.* This is because a trust fund liability from its essential nature is inseparable from the trust property.

THE CLAIM AGAINST PETITIONER AS A LEGATEE WAS NOT PROPERLY BEFORE THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals in its opinion said:

> "The Commissioner did not raise and the Board did not pass upon the question of liability of a legatee or beneficiary as a statutory transferee." (R. 94.)

* This doctrine has never been discovered or applied by the Judiciary of England. In many American states it has been repudiated. O'Bear Jewelry Co. v. Volfer, 106 Ala. 205; Crawfordsville National Bank v. Dovetail Body Co., 143 Ind. 550; Hospes v. North Western Mfg. Co., 48 Minn. 174.

The following cases hold that the Circuit Court of Appeals in appeal from the Board of Tax Appeals has no right to reverse the decision of the Board on a question not presented or urged before the Board: *Helvering v. J. L. Brandeis & Sons, 75 F. (2d) 487, 489 (C. C. A. 8th); Tulsa Tribune Co. v. Commissioner, 58 F. (2d) 937, 940 (C. C. A. 10th); Glassell v. Commissioner, 42 F. (2d) 653 (C. C. A. 5th); Hartley v. Commissioner, 72 F. (2d) 352 (C. C. A. 8th); Atkins Estate v. Lucas, 36 F. (2d) 611, 614 (App. D. C.); Tricou v. Helvering, 68 F. (2d) 280, 286 (C. C. A. 9th).*

The opposite view is taken in *Helvering v. General Utilities & Operating Company, 74 F. (2d) 972, 976 (C. C. A. 4th)* (now pending in this Court) and other decisions of the same Court.

But regardless of which of these views is the correct one there is another vitally important question not present in those cases but presented here. Not only did the Commissioner fail to raise the question of the liability of petitioner as a legatee before the Board of Tax Appeals, *but he did not raise it in the notice of deficiency* which is addressed only to the estate and not to the legatee and which is a claim solely against the estate (R. 15). As pointed out by the Circuit Court of Appeals (R. 97), the statute required a claim under *Section 280* to be made by the Commissioner "in no case later than one year after the enactment of this Act" (R. 92), which was February 26, 1927. No claim was made against the legatee until it was first made in the Government's brief filed in the Circuit Court of Appeals on January 27, 1934. It was then manifestly too late to first advance this new and novel claim and to advance it against a different person. The notice of deficiency was addressed:

"Estate of Charles H. Hulburd,
c/o De Forest Hulburd." (R. 15.)

In this notice there was no word about any claim against the legatee. Would a notice addressed to one Justice of this Court in care of another Justice which contained nothing in its context concerning a tax deficiency claim against the Justice in whose care it was addressed, be sufficient to extend the statute of limitations so as to permit a claim to be timely made seven years later against the Justice in whose care the notice was addressed? Obviously not.

THE PETITIONER WAS NOT LIABLE AS A LEGATEE ON THE MERITS BECAUSE NO PROPERTY OF THE VAN SICKLEN COMPANY WAS AT ANY TIME TRANSFERRED TO HIM.

In the case at bar the respondent merely proved that Charles H. Hulburd in 1919 received $8,000 from the Van Sicklen Company. He did not trace any of this money into the hands of the executors or into the hands of this petitioner, who as legatee is one step farther removed from Charles H. Hulburd than his executors. Between 1919 and the date of his death in 1924, Charles H. Hulburd very likely did and for aught that appears spent the $8,000 which he received from the Van Sicklen Company in 1919, for current expenses during the period of approximately five years between its receipt and his death. From the mere fact that his legatee years afterwards received $20,685.79 in cash, it cannot be assumed that the $8,000 received in 1919 by the decedent from the Van Sicklen Company, or any part thereof, was included in this sum. This principle of law is well established. A statement of it appears in the Article on *"Trusts"* in *65 Corpus Juris, paragraphs 889-900,* and particularly in *paragraph 900.* In *St. Louis & S. F. R. Co. v. Spiller, 274 U. S. 304,* this Court said, at page *310:*

"The money was not earmarked. It was mingled when collected with other money received from operation. And no special account was kept of it, The latest exaction occurred five years before the appointment of the receivers. The assertion that the money collected can be traced into the receivers' hands is confessedly without any support except the stipulated fact that throughout the ten years which elapsed between the earliest exaction and the transfer of the properties to the new company, the old one and the receivers had, at all times, in the several banks on which checks for current expenses were drawn, a working balance, in the aggregate, largely in excess of Spiller's claim. Such a showing fails to bring the present case within the rule by which, when trust funds are mingled with others, the *cestui* may assert an equitable lien upon the mingled mass to the extent of his contribution thereto. *American Can Co. v. Williams, 101 C. C. A. 634; 178 Fed. 420, 423; Re: A. D. Matthews' Sons, 151 C. C. A. 635; 238 Fed. 785, 787.* An illegal exaction does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks. For aught that appears, all the money illegally exacted may have been spent for current operating expenses."

The last sentence of this quotation applies to this phase of the case at bar. Because of the failure of the proof to trace any of the assets of the Van Sicklen Company into the hands of this petitioner no property in his hands can be subject to a trust and be said to belong to creditors of that company. *People's Industrial Life Ins. Co. of La. v. United States, 29 F. (2d) 650, (C. C. A., 5th).*

THE NOTICE OF DEFICIENCY WAS INSUFFICIENT TO EXTEND THE STATUTE OF LIMITATIONS.

When the notice of deficiency was addressed to "Estate of Charles H. Hulburd" there was no such entity in existence and when the appeal was filed by the Executors they were not Executors and had no right to act as such and no right to file the appeal and it should have been dismissed for want of jurisdiction. In *Lieberman's Committee v. Commissioner, 54 F. (2d) 527, (C. C. A., 2nd),* the Court in reaching this conclusion said at page *530:*

> "The Committee's powers as fiduciaries had ceased by local law and not being within *Section 231(a)* they had no right to apply to the Board, hence the Board was without jurisdiction to redetermine the deficiencies in qestion, and the petition should have been dismissed."

The petitioners in their petition set out that the estate had been wholly distributed and that they had been discharged as exectuors (R. 7, par. 5 (a)). They annexed to the petition a copy of their discharge (Exhibit C, R. 26, 27). They thus put the Commissioner on notice and the Board on notice of the situation and rendered pertinent the following observation in the case of *Lieberman's Committee,* at page *529:*

> "That the Commissioner being charged of knowledge of the local law, he must be held to have known that the Committee's authority had ceased."

In an Amended Petition, petitioners specifically pointed out the effect on jurisdiction, to which these facts alleged in the original petition, gave rise (R. 15).

In *Nauts v. Clymer, 36 F. (2d) 207 (C. C. A., 6th)*, the facts were as follows:

On March 15, 1920, the decedent filed his 1919 return. Hence the statute of limitations would have expired March 15, 1925. The Commissioner mailed a 60-day letter on December 10, 1924, which if it was a sufficient notice would have extended the statute of limitations for sixty days or until May 15, 1925, under the provisions of *Section 277 of the Revenue Act of 1924 (26 U. S. C. A., Sec. 1057 and Note)*. The tax was assessed April 3, 1925. The plaintiff legatee of $300,00 under the will, paid the tax and brought suit to recover it on the ground that it was assessed after the statute of limitations had run. The case turned upon the sufficiency of the notice to extend the statute. If it extended the statute, the assessment was in time, otherwise it was not. The notice was addressed as follows:

"George H. Marsh, Deceased,
L. C. Morgan, Executor,
Van Wert, Ohio".

When the notice was sent the executor had been discharged and the estate administered as in the case now at bar. The Circuit Court of Appeals for the Sixth Circuit affirmed the District Court and held that the notice was insufficient to extend the statute of limitations.

In the case at bar the notice was addressed as follows (R. 15):

"Estate of Charles H. Hulburd,
c/o De Forest Hulburd,
86 East Randolph Street,
Chicago, Illinois."

This notice read in part as follows:

> "As provided by *Section 280 of the Revenue Act of 1926*, there is proposed for assessment against the estate the sum of $24,000.00, constituting its liability as a transferee of the assets of the Van Sicklen Company, Elgin, Illinois. * * * "

At the time this notice was sent to the estate it was not in existence and De Forest Hulburd and the other executor had been discharged as was the case in *Nauts v. Clymer.*

The case of *Nauts v. Clymer* has been cited in such a way as to indicate concurrence therein by the Circuit Court of Appeals for the Second Circuit in *Lieberman's Committee v. Commissioner, 54 F. (2d)* at page *530.*

In the opinion of the Board of Tax Appeals holding against petitioner on the issue of statute of limitations, the decision of the Circuit Court of Appeals for the Sixth Circuit in *Nauts v. Clymer* is "distinguished" by the following *ipse dixit* of the Board:

> "While indicating the deficiency notice mailed appeared insufficient, having been addressed to only one of the three executors who had distributed the estate and been discharged, the Court rather emphasized the fact that the limitation expired before the assessment of April 3, 1925."

This overlooks the point that *the limitation would not have expired before the assessment of April 3, 1925, if the notice had been sufficient* and that in order to conclude that the limitation had expired before the assessment of April 3, 1925, it was necessary for the Court to squarely hold that the notice of deficeincy was insufficient to extend the statute of limifations because of the

discharge of the executor and settlement of the estate prior to its mailing and the Court did so hold.

Obviously the case of *Nauts v. Clymer* cannot be distinguished from the case at bar unless the fact that here the discharged executor appealed to the Board of Tax Appeals (and in the very petition on appeal pleaded his discharge and annexed thereto a certified copy of it (R. 5-9)), put him in a worse position than if he had paid the tax and then sued to recover it, as was done in *Nauts v. Clymer.* Such a construction of the statute "is not consistent with the great remedial purposes of the legislation creating the Board of Tax Appeals" (quoted from *Helvering v. Taylor, 293 U. S. 507, 516),* which was that one might have an opportunity to litigate a question before paying the tax in the same way that hitherto he could litigate it after paying the tax. These executors did not mislead or deceive the Commissioner because they pleaded their discharge, the distribution of the estate and set up the statute of limitations in the petition on appeal filed with the Board of Tax Appeals (R. 6). The effect of the Court of Appeals' decision on this point is to put them in a worse position because they appealed, than they would have been in had they not appealed.

In *Haag v. Commissioner, 59 F. (2d) 516, 517,* an executrix who had been discharged wrote a letter requesting assessment of tax within one year from the date thereof. The assessment was not made within the period requested and if the letter was effective the assessment was outlawed. The Court (opinion by the same Judge who wrote the opinion in the case at bar) held in *59 F. (2d) 516,* at page *517,* that the executrix having been discharged had no authority or right to write the letter. Hence it was

ineffective. That this holding cannot be reasonably reconciled with the one at bar that the former executors had authority to file the appeal with the Board is apparently recognized on page 11 of the Government's answer to the petition for the writ.

To say that an agent who has ceased to be an agent or an officer of the Court who has ceased to be an officer of the Court can make his acts, done after his authority has ceased, good as such agent or officer and confer authority upon himself by "waiver" of his own manufacture, is without support both in authority and in reason. To hold that one who appeals to the Board of Tax Appeals thereby waives the right to press one of the grounds urged in his appeal is utterly inconsistent with the spirit and purpose of the legislation creating that Board.

CONCLUSION.

On the merits the estate was not liable for the debt of the Van Sicklen Company because it received none of the property equitably answerable for that company's debt. The Trust Fund Doctrine is allied to the equitable doctrine of unjust enrichment and only an estate which has been unjustly enriched by receipt of a debtor's property is equitably answerable to respond to the extent of the property received.

When the appeal was filed the estate was not in existence and the executors were not such and had no right to file the appeal and it should have been dismissed for want of jurisdiction. *Lieberman's Committee v. Commissioner, 54 F. (2d) 527, 530 (C. C. A., 2nd).*

The question of the liability of the legatee was not raised before the Board of Tax Appeals and was not

raised in the notice of deficiency and should not have been considered by the Court. On the merits the legatee was not liable because he received none of the property of the Van Sicklen Company.

There is no authority in the *Revenue Act of 1926* for proceeding against estates defunct at the time of its enactment.

Furthermore, except in the case of an alleged liability under *Section 3467 of the Revised Statutes*, no authority can be spelled out of the words of *Section 280** for proceeding thereunder against anyone unless he is "a transferee of property of a taxpayer." If a person proceeded against is not a "transferee of property of a taxpayer" authority is lacking in the statute to proceed before the Board of Tax Appeals. This is clearly pointed out in *Whitney, 26 B. T. A. 212, 217*, in which the Commissioner has published his acquiescence in C. B. XIII-2 at page 19. Neither the executors nor the legatees in the case at bar were transferees of property of the taxpayer. If there is any authority in the words of *Section 280* for proceeding against them we emphatically challenge the respondent to point out the words of that section from which such authority may be spelled out. Indeed, the only authority contained in said section for proceeding against executors who are not transferees of property of a taxpayer is in case of liability under *Section 3467 of the Revised Statutes*, which claim was expressly abandoned in the case at bar along with any other possible claim under *section 3467*.

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* The statute quoted on page 19 is not retroactive as pointed out on pages 21 and 22 hereof. It does not authorize proceedings against executors discharged before its enactment.

Where the executor has been discharged and a debt due the government is not paid there is still no authority for proceeding against the legally discharged executors as such,* but they are personally liable if before discharge they had notice of the government's claim under *Section 3467 R. S.* That is the statute designed to cover such situation. There is no liability under that section in this case because the executor before his discharge had no notice of the government's claim.**

As pointed out in the petition for the writ, the order of the Probate Court discharging the executors is not subject to collateral attack. The law of Illinois must be read as a whole and under that law estates cannot be re-opened and claims made therein which are not presented within one year after the granting of letters of administration except as to the univentoried portion of an estate and it is not claimed that any of decedent's estate was not inventoried. *(People v. Small, 319 Ill. 437, 447.)*

For the foregoing reasons the decision of the Circuit Court of Appeals for the Seventh Circuit should be reversed and the decision of the United States Board of Tax Appeals should be affirmed.

All of which is respectfully submitted.

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* Assuming the section quoted on page 19 is not retroactive and does not apply to executors discharged prior to its enactment.

** Besides liability under this Section assumes an enforceable claim against an estate, which for the foregoing reasons does not exist here.